Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS
CLERK

82-644

No. _____

IN THE

Supreme Court of The United States

ROBERT LEE GRAY,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL M. STEIN
(Counsel of Record)
JENNINGS & JENKS
3435 American River Drive
Suite C
Sacramento, CA 95825
Telephone: (916)482-4910

QUESTIONS PRESENTED

I

WHETHER PETITIONER IS ENTITLED TO REPRESENTATION OF COUNSEL UNHAMPERED BY CONFLICT OF INTEREST.

II

WHETHER, AT THE VERY LEAST, PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM OF INADEQUATE REPRESENTATION DUE TO A CONFLICT OF INTEREST ON THE PART OF HIS ATTORNEY.

INDEX

PAGE

Questions Presented..... i

Opinions Below..... 1

Jurisdiction..... 2

Statute Involved..... 2

Statement of Case..... 3

Reasons for Granting Writ.....11

Conclusion.....12

Appendix A

Memorandum of BROWNING, Chief Justice, MERRILL and WRIGHT, Circuit Judges, United States Court of Appeals for the Ninth Circuit of May 24, 1982.....15

Order of BROWNING, Chief Justice, MERRILL and WRIGHT, Circuit Judges, United States Court of Appeals for the Ninth Circuit of July 14, 1982.....18

Exhibit 1

Affidavit of Robert Gray.....19

TABLE OF CASES

PAGE

Brown v. United States (1982)
665 F.2d 271..... 7

Cuyler v. Sullivan (1980)
446 U.S. 335..... 7,8

Holloway v. Arkansas (1978)
435 U.S. 475, 481..... 7,8

Wood v. Georgia (1980)
450 U.S. 261..... 8

STATUTES

Sixth Amendment of the Constitution of the United States..... 2,7,11

Title 28 U.S.C. Section 1254(1)..... 2

Title 21 U.S.C. Section 941(a)(1).... 3

Title 28 U.S.C. Section 2255..... 5,11

Rule 35 of the Federal Rules of Criminal Procedure in the U.S. District Court..... 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

ROBERT LEE GRAY, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Lee Gray, the Petitioner herein, prays, that a Writ of Certiorari issue to review the denial of appeal by the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 24, 1982 and the Court's denial of Petitioner's petition for rehearing and suggestion for rehearing en banc on July 14, 1982.

OPINIONS BELOW

The opinions of the Court are printed in Appendix A hereto, infra, pages

15 through 18.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's timely appeal on May 24, 1982 (Appendix A, infra, page 15). A timely petition for rehearing was denied on July 14, 1982 (Appendix A, infra, page 18). The jurisdiction of the Supreme Court is involved under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On December 16, 1977, Petitioner and a certain Marie A. Patzig were arrested and charged with violation of Title 21 U.S.C. Section 941(a)(1), Possession of with intent to distribute a controlled substance.

Petitioner and Marie Patzig were both represented by Marie Patzig's attorney. Pursuant to the "stipulation relative to court trial" the Court was authorized, in determining guilt, to use all stipulations, evidence submitted at the

hearing of suppression of evidence, all memorandum in support thereof, and other matters of record before the United States District Court.

Pursuant to the Statement of Facts submitted by Appellant's attorney, "Marie A. Patzig after the search of Appellant's residence was arrested in December 16, 1977, with the probable cause being based on (1) the fact that approximately 219 grams gross weight of cocaine was discovered in her brown flight bag that she had identified to Agent Cameron, (2) the fact that the 1977 Chevrolet was rented to Patzig, and (3) the fact that 24.4 grams gross weight of cocaine was discovered in a Texas Instruments computer that also contained Patzig's social security card."

At the time that the stipulation was filed and discussed with Petitioner, he expressed concern as to the word "possess" in the stipulation because the

cocaine was brought in against his will.

The Court, in response to Petitioner's inquiries, asked if he knew the cocaine was in his home and he said "Yeah, when they told me."

The Court, then based on the stipulated facts, found Petitioner guilty of the charge.

On January 4, 1979, Petitioner filed a Notice of Appeal from the Judgment with the United States District Court for the Eastern District of California.

On August 7, 1980, judgment was affirmed.

A subsequent petition for a rehearing was filed and denied by this Court on September 9, 1980.

On October 27, 1980, Petitioner filed a motion for relief pursuant to Title 28 U.S.C. Section 2255 and Rule 35 of the Federal Rules of Criminal Procedure in the U.S. District Court.

On February 18, 1981, the U.S. District Court issued its partial denial of the motion for relief.

On April 28, 1982, the U.S. District Court denied the motion for relief.

On May 5, 1981, Petitioner filed his Notice of Appeal with the Ninth Circuit Court of Appeals.

On May 24, 1982, Petitioner's appeal was denied.

On July 14, 1982, Petitioner's motion for rehearing was denied.

On August 13, 1982, Petitioner's motion to vacate mandate was denied.

Among other points, Robert Lee Gray has maintained that he was represented by an attorney, James McCabe, who also represented a Marie Patzig who was arrested with Gray but released through Mr. McCabe's efforts. Mr. Gray has further maintained that Marie Patzig paid Mr. McCabe's legal fees. Mr. Gray's premise is that he agreed

to a stipulated set of facts which amounted to a plea of guilty on the advice of Mr. McCabe without the effective and impartial assistance of independent counsel.

Both the United States District Court and the Ninth Circuit Court of Appeals has consistently held that Gray is not entitled even to a full evidentiary hearing on this point.

The legal issue here is, of course, the right to representation free from conflict of interest under the Sixth Amendment to the Constitution of the United States. See Cuyler v. Sullivan (1980) 446 U.S. 335; Holloway v. Arkansas (1978) 435 U.S. 475, 481.

Indeed, the Ninth Circuit Court of Appeals has recognized that a defendant is entitled to a full evidentiary hearing on the issue of a conflict of interest. See Brown v. United States (1982) 665 F.2d 271.

The apparent problem in the instant case is whether there has been a sufficient demonstration of the conflict of interest.

It is submitted that the affidavit of Robert Gray, attached hereto as Exhibit 1 for the Court's convenience, read in light of the Supreme Court holdings under Sullivan - Holloway, supra, as more clearly spelled out in Wood v. Georgia (1980) 450 U.S. 261, meets the threshhold test.

This Court will recall that in Wood v. Georgia, supra, this Court held as follows:

> "Courts and commentations have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party..."
>
> "On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the

employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below. It is, however, difficult for this court to determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument on this issue. Nevertheless, the record does demonstrate that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further.[18]"

Footnote 18 in pertinent part holds as follows:

"Moreover, Sullivan mandates a reversal when the trial court

has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists."

The Supreme Court concluded as follows:

"For these reasons, we base our decision in this case on due process grounds. The judgment below is vacated and the case remanded with instructions that it be returned to the State Court of Fulton County. That court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that

there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests."

This conflict of interest claim was made by Gray on several occasions to the trial judge during the motion to vacate judgment (28 U.S. 2255).

REASONS FOR GRANTING WRIT

Petitioner has not and is not claiming that multiple representation alone or the possibility of a conflict of interest violates the Sixth Amendment to the Constitution of the United States of America.

However, Petitioner does claim that, at the very least, he was entitled to a full evidentiary hearing on his motion to vacate judgment (28 U.S. 2255) raising the issue of conflict of interest.

When an individual is persuaded by an

attorney to plead guilty when that attorney is being paid by a third party who is charged with the same crime and subsequently released, it cannot be seriously argued that an individual has received the protection and the rights accorded to him or her under the Sixth Amendment to the Constitution of the United States.

This is especially true in a situation where an individual had maintained his innocence and the only other individual to whom the controlled substances could have belonged was Marie Patzig.

CONCLUSION

It is submitted that Petitioner is entitled to an evidentiary hearing on his claim of conflict of interest.

Respectfully submitted,

CARL M. STEIN

CERTIFICIATE OF SERVICE

I, Carl M. Stein, a member of the Bar of this Court and counsel of record for petitioner, hereby certify that on this OCT 04 ~~day of September~~, 1982, I served three (3) copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit" upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

CARL M. STEIN

I, Carl M. Stein, do hereby say as follows:

1. That on ~~September~~ OCT 04, 1982, I deposited in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, I mailed this Writ of Certiorari. Said mailing was done at the Federal Post Offices, 2801 Arden Way, Sacramento, California 95825.

Dated: ~~September~~ OCT 04, 1982.

CARL M. STEIN

Sworn to and subscribed before me on the above written date.

BETTY S. NAKAYAMA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE GRAY,	)	
	)	
Petitioner-Appellant,	)	No. 81-4103
	)	
vs.	)	(D.C.No.CV80-864,
	)	CR-S-78-9-TJM)
UNITED STATES OF AMERICA,	)	
	)	MEMORANDUM
Respondent-Appellee.	)	
	)	

Submitted May 13, 1982

Appeal from the United States District Court for the Eastern District of California
District Judge Thomas J. MacBride, Presiding

Before: BROWNING, Chief Judge, MERRILL and WRIGHT, Circuit Judges.

Robert Gray appeals denial of a 28 U.S.C. Section 2255 motion to vacate his conviction for possession of cocaine with intent to distribute. This motion realleges a fourth amendment violation initially raised on direct appeal[1/] in addition to claims of Gray's incompetency to enter into the stipulation of facts used at trial and inadequate representation by

1/ United States v. Gray, 626 F.2d 102 (9th Cir. 1980).

trial counsel due to incompetence or a conflict of interest.

The fourth amendment claim cannot be raised in a collateral proceeding unless Gray was denied a full and fair opportunity to raise the issue on direct appeal. See United States v. Hearst, 638 F.2d 1190, 1196 (9th Cir. 1980). He has not specifically alleged any deficiency in his original appeal.

The claim that medication had rendered Gray incompetent at the time of the stipulation is unsubstantiated, particularly in light of his assurance to the trial court that he had not taken any mind-altering drug for a week before the stipulation. Gray fails to address the district court's carefully reasoned finding that he was not prejudiced by the alleged incompetence of his trial counsel, and he has not supported his conclusory claim that his counsel held a conflict of interest.

The judgment is AFFIRMED. The mandate will issue now. The district judge will consider the revocation of release on bail.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE GRAY, Petitioner-Appellant,	)	No. 81-4103
vs.	)	O R D E R
UNITED STATES OF AMERICA, Respondent-Appellee.	)	

Before: BROWNING, Chief Judge, MERRILL and WRIGHT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Law Offices of
JENNINGS & JENKS
3435 American River Drive, Suite C
Sacramento, California 95825
Telephone: (916) 482-4910

Attorneys for Petitioner
ROBERT LEE GRAY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

ROBERT LEE GRAY, Petitioner, vs. THE UNITED STATES OF AMERICA, Respondent.	No. Cr. S-78-9-TJM AFFIDAVIT OF ROBERT LEE GRAY IN SUPPORT OF MOTION TO VACATE CONVICTION

On December 15, 1977, after I was arrested for Marie Patzig's controlled substance, I recieved (sic) a phone call immediately after arriving in the South Tahoe City jail, from a Mr. James McCabe. A person I have never heard of or met before. He said, Marie's friend, Pat Delgadillo had called the house in Tahoe, that I had just moved into with an existing renter, and had heard of my arrest. Mr. James McCabe was Marie Patzig's friend and said that he would remain in San Diego for the weekend and then he would fly up to Tahoe and get me out. Luckily Roger Malin bailed me out. Marie was in jail after spending the night in the house in Tahoe with the DEA agents. They found the full contents of cocaine in her traveling bag and further amounts were found in her wallet. Marie flew to San Diego after explaining to me that James McCabe had been her "friend" for two years and that he could work won-

ders in situations like this. She would call me after she spoke to James McCabe. Several days later, she called me and gave me a date to see McCabe. After arriving in San Diego, Marie Patzig took me over to McCabe's office. Pat Delgadillo was there also. McCabe met me and asked me to wait outside of the office while he heard their story first. After 20 minutes he called me in to hear my story of what happened. After telling me that both Pat and Marie told him they brought the substance to Tahoe and that I had no knowledge of it, McCabe wanted to hear what I had to say. Marie and Pat stayed in the office. McCabe said the agents had found 12800^{00} (sic) in a bag and that because I lived in the house that I had to sign with Marie for the money to be given to McCabe for the ensuing legal fees. I said I hadn't even heard of the money until just then. He said if I didn't sign that the government would just

keep the money. I looked at Marie and she said that I should sign it in order to retain McCabe. So I did. McCabe then said that he would be representing both of us and it shouldn't take long to get the case dropped. McCabe said for me to go back to Tahoe and relax he would take care of everything. About a week later Marie called me and happily exclaimed that they had dropped the case against her. I said why? And she got real upset that I wasn't happy for her. I wanted to know why, when the cocaine was hers, it was in all her possessions and both she and James McCabe knew that. After I realized McCabe was not representing me but just Marie, I got another attorney. James McCabe lied to me just as he lied to the District Attorney. No matter how long it takes I will see McCabe disbarred.

/s/ Robert Gray

ROBERT LEE GRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ASSOCIATION OF ATTORNEY AND ENTRY OF APPEARANCE

CARL M. STEIN, a member of the Bar of the State of California and the United States Supreme Court hereby acknowledges his association with the Law Offices of Jennings & Jenks, for the purpose of filing, briefing and arguing this Writ of Certiorari and subsequent matters and does make this document an entry of appearance for all purposes.

CARL M. STEIN

I hereby consent to the herein association and entry.

JENNINGS & JENKS

By: MARTIN F. JENNINGS, JR.

82-644

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

Supreme Court of The United States

ROBERT LEE GRAY,

Petitioner,

vs.

THE UNITED STATE OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

CARL M. STEIN
(Counsel of Record)
JENNINGS & JENKS
3435 American River Drive
Suite C
Sacramento, CA 95825
Telephone: (916)482-4910

INDEX

PAGE

Supplemental Appendix

Opinion of Judge Thomas L. MacBride, United States Court for the Eastern District, of April 28, 1981..... 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

ROBERT LEE GRAY, Petitioner,	)	
v.	)	Crim. No. S-78-9
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER

On June 2, 1978, the court, upon a stipulated set of facts, found petitioner guilty of possession with intent to distribute cocaine. See U.S.C. Section 841(a)(1). Petitioner subsequently filed a Section 2255[1/] motion to vacate his conviction and sentence. He contends that

1/ A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(1) evidence used against him was obtained in violation of the Fourth Amendment, (2) he was denied effective assistance of counsel and (3) he was incompetent to enter into the stipulated set of facts or to assist his attorney in preparing his defense.

On February 12, 1981, the court issued an order in which it ruled that petitioner's Fourth Amendment claims were not cognizable in this Section 2255 proceeding, see Court's Order, filed February 12, 1981, at pages 1-2, citing United States v. Hearst, ___F. 2d___, No. 78-3612 (9th Cir. October 17, 1980); United States v. Gray, 626 F.2d 102 (9th Cir. 1980); United States v. Currie, 589 F.2d 993 (9th Cir. 1979), and that petitioner had failed to demonstrate that his counsel had acted in an incompetent manner, see Court's Order, filed February 12, 1981, at pages 2-6, citing, inter alia, Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)

(en banc), cert. denied, 440 U.S. 974 (1979). Accordingly, the court denied petitioner's Section 2255 motion insofar as it was based on his Fourth Amendment claims and his claim that his counsel failed to provide competent assistance. See Court's Order, filed February 12, 1981, at page 7. In addition, the court granted petitioner leave to file supplemental materials in support of his claims that his counsel had a conflict of interests at the time he represented him, and that he was incompetent to enter into the stipulated set of facts or to assist his attorney in preparing his defense. See Court's Order, filed February 12, 1981, at page 7. The supplemental materials have been filed, and the court is now ready to rule on petitioner's remaining claims.

As a preliminary matter, the court notes that on Februar, 20, 1981, petitioner filed a notice of appeal from the court's

February 12, 1981 order.

> The general rule is that once a notice of appeal has been filed, the lower court loses juridiction over the subject matter of the appeal.... This rule is clearly necessary to prevent the procedural chaos that would result if concurrent jurisdiction were permitted.

Matter of Combined Metals Reduction Co., 557 F.2d 179, 201 (9th Cir. 1977). However,

> (w)here the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction.

Ruby v. Secretary of the Navy, 365 F.2d 385, 389 (9th Cir. 1966) (en banc)[emphasis added], cert. denied, 386 U.S. 1011 (1967). Accord, Leonhard v. United States, 663 F.2d 599 (2d Cir. 1980); United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979) (en banc); Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.),

cert. denied, 409 U.S. 1039 (1972). Contra, Williams v. Bernhardt Bros. Tugboat Serv., Inc., 357 F.2d 883 (7th Cir. 1966); District 65, Distributive, Processing & Office Workers Union v. McKague, 216 F.2d 153 (3d Cir. 1954). The Supreme Court has held that orders in post-conviction proceedings are interlocutory and therefore not appealable unless they are final "as to the whole subject-matter and as to all the causes of action involved." Collins v. Miller, 252 U.S. 364, 370 (1920) [habeas corpus]. See also Andrews v. United States, 373 U.S. 334 (1963) [28 U.S.C. Section 2255]. In the case sub judice, the court's February 12, 1981 order granted petitioner leave to file supplemental materials and did not finally dispose of all issues presented by his Section 2255 motion. Consequently, the order was clearly not appealable, and petitioner's filing of a notice of appeal did not divest the court of jurisdiction over

the subject matter of this action. See Ruby v. Secretary of the Navy, supra. Accordingly, the court will proceed to consider the merits of petitioner's remaining claims.

Counsel's Alleged Conflict of Interests

Petitioner and his co-defendant, Marie Patzig, were represented by the same counsel, James M. McCabe. Petitioner asserts that "(t)he fact that Marie Patzig was never charged with a crime indicate(s) that either McCabe was able to work a deal with the U.S. government at the expense of (petitioner) or that Marie Patzig was involved with Surprison (the government informant) in setting up (petitioner) for said arrest, all with the knowledge of Attorney McCabe." See Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. (Section) 2255, filed October 27, 1980, at page 3.

The Ninth Circuit has stated that:

> While it is established that criminal defendants have a Sixth Amendment right to the assistance of counsel unburdened by conflicting loyalties, it is also clear that there is no per se rule against joint representation. We have held that "until an actual conflict is shown to exist or can be reasonably foreseen an attorney may, in good faith, represent both defendants...."
>
> We recently affirmed "(t)he long established rule in this circuit ... that to prevail on (a conflict of interest claim), the defendant has the burden of establishing that the joint representation in fact created an actual conflict of interst and prejudiced (his) defense." Thus, the defendant must demonstrate "that specific prejudice has resulted to him from the alleged conflict of interest."

Willis v. United States, 614 F.2d 1200, 1202-03 (9th Cir. 1979) (citations omitted).

As previously stated by this court:

> Petitioner's allegation that his attorney either negotiated with the government to drop the charges against Patzig in return for a conviction of petitioner or that petitioner was "set up" by Patzig and Su(r)prison with his attorney's knowledge, if proven, would establish an actual conflict of interest.

> These allegations are conclusory, however, and petitioner will be given (an opportunity) to support them with affidavits.

See Court's Order, filed February 12, 1981, at page 7. In support of his conflict of interests claim, petitioner has filed his own affidavit and that of United States Magistrate Paul Gervais.

Petitioner's affidavit merely establishes that he retained Mr. McCabe at Ms. Patzig's suggestion, that both he and Ms. Patzig were advised to sign for the money seized at his residence so that it could be used for attorney's fees, that Mr. McCabe assured him that he would get the case "dropped," that the charges against Ms. Patzig were dismissed, and that it is petitioner's subjective belief that Mr. McCabe "was not representing (him) but just (Ms. Patzig)." See Affidavit of Robert Lee Gray, filed March 3, 1981. These declarations fail to supply any "objective proof" of either the existence of an actual conflict

of interests, or the presence of actual prejudice resulting from joint representation; accordingly, petitioner's affidavit fails to demonstrate that he is entitled to have his conviction vacated. Id. at 1205.

Magistrate Gervais' affidavit merely establishes that he was in his office until 4:00 p.m. on the day petitioner's house was searched, and that therefore, he was available for the purpose of obtaining a search warrant until that hour. See Declaration in Support of Motion to Vacate Conviction, filed March 3, 1981. Petitioner argues that had Mr. McCabe "not had a conflict of interest, (he) could have by proper use of discovery obtained the testimony of (the magistrate) so as to dispute the issue of exigent circumstances relied upon by the government to justify a warrantless (search)." See Declaration in Support of Motion to Vacate Conviction, filed March 3

1981. However, there is nothing in the record which indicates that Mr. McCabe's failure to obtain this testimony resulted from a conflict of interests of petitioner and Ms. Patzig. Regardless of any possible conflict in other areas, suppression of the evidence seized at petitioner's residence would have benefited both defendants. Magistrate Gervais' affidavit thus fails to supply any support for petitioner's conflict of interests claim.[2/]

There being nothing more than conclusory allegations to support the claim, the court will deny petitioner's motion to vacate his conviction insofar as it is

---

2/ Further, the magistrate's declaration that he was in his office until 4:00 p.m. on the day of the search is consistent with the testimony of the agents involved in the search. See United States v. Gray, 626 F.2d 102, 104 (9th Cir. 1980). Thus, no substantial prejudice resulted from counsel's failure to obtain the magistrate's testimony at the time of the supression hearing. Consequently, the magistrate's affidavit is insufficient to support petitioner's claim that he was denied competent assistance of counsel. See Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc), cert. denied, 440 U.S. 974 (1979).

based on his conflict of interests claim.

Petitioner's Competence to Enter into the Stipulated Set of Facts or to Assist his Attorney in Preparing his Defense

Petitioner contends that he was incompetent to enter into the stipulated set of facts or to assist his counsel in preparing his defense. The Supreme Court has established the following standard for determining a defendant's competency to stand trial in federal court:

> whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402 (1960).

As this court previously stated:

> Petitioner's claim that he was unable to assist his counsel in preparing a defense and that he was incompetent to enter into a stipulation of fact is contradicted by everything in the record before this court. Petitioner stated on the record shortly before entering into the stipulation that, although he had a

> back injury for which medication was prescribed, he had specifically regrained from taking that medication for one week prior to the hearing. Reporter's Transcript (of the Proceedings of June 2, 1978 and January 4, 1979, filed January 31, 1979)(hereafter RT) at 3. Counsel for petitioner stated, in response to questions from this court, that he considered petitioner competent to proceed. Id. This court's observations confirming petitioner's alertness and articulate participation in court proceedings appear in the record. Id.

See Court's Order, filed February 12, 1981, at page 2. The court determined that petitioner should be given an opportunity to supply support for his claim of incompetence, and the court therefore granted him leave to file affidavits supporting the claim. See Court's Order, filed February 12, 1981, at page 2.

In support of his claim of incompetence, petitioner has now filed medical reports prepared by two physicians, Dr. Phillip Hugh Hay and Dr. Howard B. Emery. The report of Dr. Hay merely indicates that he began

treating petitioner a few months after the trial, and that petitioner suffered from "an unrecognized depression for a time." The report of Dr. Emery merely indicates that petitioner was examined by a psychologist within the last two months, and that the psychologist "feels that there is some evidence of a serious thought disorder and severe depression to the point of psychosis." There is nothing in either medical report which demonstrates that at the time of petitioner's trial he was suffering from a mental disorder of such a magnitude that he lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," or that he could not have had "a rational as well as factual understanding of the proceedings against him." See Dusky v. United States, supra. The medical reports thus fail to contradict the record before the court, a record which clearly demonstrates

that petitioner was competent to stand trial. See RT. The court will, therefore, deny petitioner's motion to vacate his conviction insofar as it is based on his claim of incompetence.

The court has now denied petitioner's motion to vacate his sentence on each of the grounds presented by his motion. For the reasons stated above, and for the reasons stated in the Court's Order of February 12, 1981,

IT IS ORDERED that petitioner's Section 2255 motion to vacate his conviction and sentence is hereby denied.

IT IS FURTHER ORDERED that petitioner appear before the court on May 4, 1981 at 9:30 a.m.

IT IS FURTHER ORDERED that petitioner remain released on bail until May 4, 1981.

DATED: April 28, 1981.

/s/ T.J. MacBride
UNITED STATES DISTRICT JUDGE

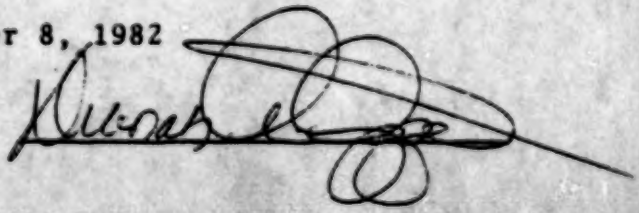
CERTIFICATE OF SERVICE

I, Deborah A. Appel, a citizen of the United States over eighteen (18) years of age, hereby certify that on this 8th day of October , 1982, I served copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit - Supplemental Appendix" upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

I, Deborah A. Appel, do further say as follows:

That on October 8, 1982, I depostied in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, this Supplemental Appendix to the Writ of Certiorari, in the County of Sacramento, State of California.

Dated: October 8, 1982



Sworn to and subscribed before me on the aforementioned date.

Betty S. Nakayama